COURT OF APPEALS
DECISION
DATED AND FILED

October 2, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP212

Cir. Ct. No. 2006CV4408

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DAVID S. PERHACH,

PLAINTIFF-APPELLANT,

V.

PHOENIX CARE SYSTEMS, INC., LEONARD F. DZIUBLA AND DONALD R. FRITZ,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Reversed.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 FINE, J. David S. Perhach appeals an order dismissing his declaratory-judgment action against Phoenix Care Systems, Inc., and its officers, Leonard F. Dziubla, and Donald R. Fritz. Perhach claims that the circuit court

erred when it upheld Phoenix, Dziubla, and Fritz's misinterpretation of an unambiguous stock buy-out provision.[1] We agree and reverse.

I.

¶2 Perhach, Dziubla, and Fritz were the sole shareholders in Phoenix. In August of 1999, they signed a Shareholders Agreement that contained, among other things, a provision giving Phoenix and its shareholders the option to buy a "terminated" stockholder's shares at an "Agreed Price per Share in effect on the Determination Date." Paragraph ten of the Shareholders Agreement defined "Agreed Price per Share" as follows:

> The "Agreed Price per Share" shall mean the net book value of each Share as of the end of the month immediately preceding the month in which the Determination Date falls, multiplied by the number of Shares being sold and purchased, as determined by the Corporation's auditors. The net book value per Share shall be determined based upon the audited financial statements of the Corporation for the most recently completed fiscal year of the Corporation adjusted to account for the Corporation's earnings or losses, as the case may be, as of the last day of the month immediately preceding the month in which the Determination Date falls. The determination by the auditor shall be conclusive and binding on the parties.

Under the Shareholders Agreement, the relevant determination date was "the date on which the Shareholder's employment with the Corporation is terminated for any reason."

[1] In the notice of appeal, Perhach appeals an order requiring his lawyer to pay the defendants' attorneys fees and costs as a sanction for what the circuit court found was Perhach's lawyer's "profoundly disrespectful verbal and nonverbal conduct to the Court … that provok[ed] an adjournment." Perhach does not brief this issue on appeal. Accordingly, it has been abandoned. *See* ***Reiman Assocs., Inc. v. R/A Advert., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981) (contentions not briefed are waived).

¶3 On May 19, 2005, Perhach resigned. Phoenix exercised its right under the Shareholders Agreement to buy Perhach's stock, hiring the auditing firm Wipfli, LLP, to determine the price per share. Using the undisputed determination date of May 19, 2005, Wipfli determined that each share was worth $27,951.84 by dividing Phoenix's April 30, 2005, net book value by the number of outstanding shares.

¶4 Perhach sued Phoenix, Dziubla, and Fritz, claiming in his amended complaint that Phoenix did not value his stock according to the method in paragraph ten of the Shareholders Agreement, and seeking a declaration of what he alleged was the correct share price.[2] *See* WIS. STAT. § 806.04(2) (uniform declaratory judgments act).

¶5 Perhach then sought summary judgment, contending that, under paragraph ten, Wipfli was required to determine the net book value of his shares by: (1) determining the net book value as of December 31, 2004, based on 2004 year-end financial statements, and then (2) adjusting that number by earnings or losses from January 1, 2005, through April 30, 2005. Perhach claimed that Phoenix had earnings for January 1, 2005, through April 30, 2005, thus, under his method, Wipfli would have arrived at an ultimate price of $33,320.13 per share.

¶6 Phoenix, Dziubla, and Fritz argued that, under the first sentence in paragraph ten, Wipfli was required to use the net book value of the shares as of April 30, 2005, which included January and April of 2005 tax distributions to

[2] Perhach also claimed that Phoenix, Dziubla, and Fritz violated WIS. STAT. § 180.1833 (judicial remedies for disputes involving closely held corporations). This claim was dismissed by stipulation and is not at issue on this appeal.

shareholders. According to Phoenix, Dziubla, and Fritz, under the clear terms of paragraph ten, Wipfli's method of valuation and the ultimate number that it arrived at were "conclusive and binding" on Perhach.

¶7 The circuit court denied Perhach's motion for summary judgment and granted summary judgment to Phoenix, Dziubla, and Fritz, concluding that the unambiguous terms of the Shareholders Agreement supported Wipfli's valuation. *See* WIS. STAT. RULE 802.08(6) ("If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.").

II.

¶8 We review *de novo* a circuit court's grant of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment must be granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2). Additionally, the interpretation of a contract is a question of law that we also review *de novo*. ***Teacher Ret. Sys. of Tex. v. Badger XVI Ltd. P'ship***, 205 Wis. 2d 532, 555, 556 N.W.2d 415, 424 (Ct. App. 1996).

> The lodestar of contract interpretation is the intent of the parties. In ascertaining the intent of the parties, contract terms should be given their plain or ordinary meaning. If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.

See ***Huml v. Vlazny***, 2006 WI 87, ¶52, 293 Wis. 2d 169, 196–197, 716 N.W.2d 807, 820 (citations omitted).

¶9 None of the parties dispute that the terms of paragraph ten are clear. The first sentence defines "Agreed Price per Share" to "mean the net book value of each Share as of the end of the month immediately preceding the month in which the Determination Date falls, multiplied by the number of Shares being sold and purchased, as determined by [Phoenix's] auditors." It is undisputed that the determination date is May 19, 2005, and the month immediately preceding it is April of 2005. If we were to stop the analysis here, Phoenix, Dziubla, and Fritz would be correct in their assertion that Wipfli was required to use Phoenix's "net book value" as of April 30, 2005. But the analysis does not stop here. The next sentence in paragraph ten provides, and this is key, how the "net book value" must be calculated:

> The net book value per Share *shall* be determined based upon the audited financial statements of [Phoenix] for the most recently completed fiscal year of [Phoenix] adjusted to account for [Phoenix's] earnings or losses, as the case may be, as of the last day of the month immediately preceding the month in which the Determination Date falls.

(Emphasis added.) We agree with Perhach that under this sentence, it is clear that Wipfli was required, *see* ***Armstrong v. Colletti***, 88 Wis. 2d 148, 153–154, 276 N.W.2d 364, 366–367 (Ct. App. 1979) (construing "shall" in a contract as "mandatory language"), to determine Phoenix's "net book value" based on the audited financial statements for 2004, and then adjust that number by any earnings or losses from January 1, 2005, through April 30, 2005. Wipfli did not do so. The clear terms of paragraph ten allow adjustments only for earnings or losses; tax distributions are not included. Accordingly, Wipfli's "determination" is not, under the clear terms of paragraph ten, "conclusive and binding." *See* ***Salt Lake Tribune Publ'g Co. v. Management Planning, Inc.***, 454 F.3d 1128, 1138 (10th Cir. 2006) (appraiser must comply with terms of contract). Thus, we reverse the

circuit court's grant of summary judgment and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed.

Publication in the official reports is not recommended.